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In the Supreme Court of the United States

OCTOBER TERM, 19

BOYD S. LEEDOM, *et al.*, Individually and as Chairman and Members of and Constituting the NATIONAL LABOR RELATIONS BOARD, *Petitioners*,

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, a Voluntary Unincorporated Labor Organization, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 633

BOYD S. LEEDOM, *et al.*, Individually and as Chairman and Members of and Constituting THE NATIONAL LABOR RELATIONS BOARD, Petitioners

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, a Voluntary Unincorporated Labor Organization, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA

Opinions Below

The opinion of the Court below (R. 37-39) is reported at 249 F. 2d 490. The findings, conclusions and order of the District Court, which are unreported, are set forth at R. 24-32.

Jurisdiction

The jurisdictional requisites are adequately set forth in the brief for petitioners.

Statutes Involved

All relevant statutory provisions are set forth in the brief for petitioners at Appendix, pp. 39-44.

Question Presented

Whether a Federal District Court has jurisdiction to set aside a certification, issued by the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended, upon suit brought by the labor organization receiving the certification where the Board admits that it exceeded its statutory powers in establishing the bargaining unit covered by the certification.

Statement

A. The Board representation proceeding giving rise to this suit

Following a representation proceeding instituted by a petition filed on October 15, 1955 by respondent, Engineers Association, the Board issued its Decision and Direction of Election on May 28, 1956, finding appropriate a mixed unit of professional and non-professional employees at the Cheektowaga, New York plant of the Westinghouse Electric Corporation (R. 11-18). The aforesaid bargaining unit comprised 233 employees in 10 engineering job categories who were found by the Board to be professional employees within the meaning of Section 2(12) of the Act, and nine employees in three job categories who were found by the Board to be non-professional employees. Over the objections of Engineers Association (R. 13, 16, 18), the Board included the nine non-professional employees in the same bargaining unit with the professional employees without complying with Section 9(b)(1) which states:

> "Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such

> unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *"

The Board refused to conduct the separate election for the professional employees required by Section 9(b)(1)[1] on the ground that the non-professional employees in question shared a "close community of employment interest" with the professional engineers and on the further ground that the inclusion of the nine non-professionals would not "destroy the predominantly professional character" of this unit for the professional engineers (R. 16).

On June 14, 1956, the usual election by secret ballot was conducted by the Board in a mixed unit. Professional employees were not afforded the opportunity to vote as to whether they desired to be commingled (R. 17-20). In the election, a majority of the employees designated the Engineers Association as their collective bargaining representative (R. 19-20).

B. The instant suit

On July 12, 1956, respondent commenced this suit in the United States District Court for the District of Columbia for the purpose of compelling the Board to set aside the certification and to conduct a new election in accordance with Section 9(b)(1). The jurisdiction of the court was

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[1] The conduct of a 9(b)(1) election differs from the usual representation election in that separate ballots are given the professional employees on which they are asked to indicate whether they favor inclusion in a unit with non-professional employees or wish to be represented in a separate unit. If a majority of professional employees vote in favor of inclusion in a unit with non-professional employees, their ballots are added to those of the non-professional employees in the tally of choice of bargaining representative. If the professional employees vote in favor of a separate unit, their ballots are segregated and separately tallied as to choice of bargaining representative. See *Westinghouse Electric Corporation*, 107 N. L. R. B. 16, 17-19; *Sonotone Corporation*, 90 N. L. R. B. 1236, 1240-42.

founded on 28 U. S. C. 1337 and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009 (R. 2). The gravamen of the complaint was that the Board "exceeded the scope of [its] statutory authority" and "failed and refused to comply with Section 9(b)(1) of [the] Act," i.e., commingled professional and non-professional employees in the same bargaining unit without first affording the professional employees a separate election to determine whether they desired to be included with the non-professional employees (R. 7-8).

On December 3, 1956, the district court granted respondent's cross-motion for summary judgment and denied the Board's motion (R. 23). The district court held that jurisdiction existed to entertain the merits of the complaint inasmuch as the Board exceeded its statutory authority when it failed to conduct the separate election for professional employees required by Section 9(b)(1). The court held further that the refusal of the Board to conduct the required election "works irreparable harm to the statutory right that an appropriate unit for collective bargaining purpose shall only include professional employees unless a majority of them vote for inclusion of non-professional employees within the unit" (R. 30-31).

In appealing to the court below the Board did not contest the district court's construction of Section 9(b)(1) (Board brief, pp. 8, 33-34). The Board contended that the district court lacked original jurisdiction to grant equitable relief with respect to a representation determination even though such determination exceeded the Board's statutory authority. Such relief, the Board argued, could be had only in the courts of appeal and only by way of review of a "final order" in an unfair labor practice proceeding based upon the representation determination.

On September 16, 1957, the court below affirmed the decision of the district court, holding that this case did not involve "the wide area of determinations which depend upon the Board's expertise and discretion", but entailed "Board violation of a statutory requirement and resulting injury" (R. 37-39). Hence the court concluded that the representation determination could be reviewed by original equity suit in the federal district court, particularly since "review by way of §10 is too remote and conjectural to be viewed as providing an adequate remedy" in this case (R. 39).[2]

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[2] Respondent exhausted its administrative remedy for, in any meaningful appraisal of the mode of review of a certification under Section 9(d) and 10(e) or (f), an adequate remedy is not available. While the employer could literally file a charge of refusal to bargain in the unit certified against respondent under Section 8(b)(3) which might ultimately gain for respondent court review of the validity of the certification, the employer is most unlikely to do so. The employer is not aggrieved by the inclusion of the nine non-professionals in the bargaining unit. It has only to sit back and await a request to bargain in the unit as certified to avoid a charge of unfair labor practice. Absent such a request on the part of respondent the employer is free to deal with his employees on an individual basis. Hence the employer's position is such that neither legal sanction nor compulsion of the market place exist to induce it to initiate proceedings under the Act leading to court review.

Nor is it likely that the non-professionals would file unfair labor practice charges against respondent for failing to bargain on their behalf. In view of respondent's pronounced antipathy to the inclusion of these employees in the bargaining unit, the court below properly concluded that "They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative" (R. 39).

Under the Board's formulation respondent must stand idly by and sacrifice the bargaining interests of 233 professionals in the illusory hope that the advantaged employer or the unwanted non-professionals would seek to compel bargaining in the certified unit and thereby obtain for respondent judicial review of the Board's unlawful action. For respondent to be thus placed in the position of having to rely upon the mere fortuity of a Section 10(e) or (f) proceeding is hardly an adequate remedy. A statutory review procedure which is inadequate may not be termed compulsory. Consequently respondent's substantively adequate remedy against invasion of a statutory right lies in an original suit in equity.

Summary of Argument

A. Section 9(b)(1) of the Act is a mandatory limitation upon the Board's discretionary authority to establish an appropriate bargaining unit which would combine professional and non-professional employees. The Board is expressly forbidden by this *proviso* from determining that any unit other than a purely professional bargaining unit is appropriate unless the professional employees themselves indicate by a separate vote that they favor the inclusion of non-professional employees. Here the Board concedes that it committed error in sanctioning a mixed bargaining unit of professional and non-professional employees without having complied with the requirement of Section 9(b)(1). In failing to adhere to the requirement of the *proviso*, the Board deprived respondent of its statutorily created right to represent professional employees in a purely professional bargaining unit if they so chose.

Since the action in question exceeded the authority granted the Board under the Act to determine an appropriate bargaining unit, the district court correctly employed its equity powers to confine the Board to the area marked out for it by the statute. *Harmon* v. *Brucker*, 355 U. S. 579; *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145. The case presents the situation "where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action." *Panama Canal Co.* v. *Grace Line*, Nos. 251 and 252, October Term, 1957, decided April 28, 1958, at 9.

B. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, urged by the Board as precluding direct judicial review even of agency action in plain departure from the statute, is inapposite. In that case the Court held

that direct judicial review was unavailable because the agency action in question was within the authority granted the National Mediation Board under the Railway Labor Act to determine whether a system-wide or less than system-wide bargaining unit was appropriate. There, unlike the instant proceeding, the agency was not confronted with a statutory proviso such as Section 9(b)(1) prohibiting the very action in question. An analogous situation under the National Labor Relations Act to that presented in *Switchmen's* would be agency action under Section 9(b) which grants to the Board wide discretion in establishing an appropriate bargaining unit. Thus the "type of problem" involved in *Switchmen's*, i.e., "highly controversial • • • jurisdictional disputes", as to which Congress intended that agency word be final, bears no resemblance to the question of abuse of power presented in the case at bar.

C. The legislative history of the original and the amended Act manifests a congressional intent to preclude direct judicial review in the common representation determination arising under Section 9(b). However, there is no indication that Congress, in its desire to avoid delay in the commencement of the bargaining process attendant upon direct judicial review, went so far as to deny judicial relief in the case of Board action such as disregard of the mandatory 9(b)(1) limitation. It is inconceivable that Congress intended that the Board could at once refuse to be bound by an unqualified restraint upon its discretionary authority and at the same time escape judicial interdiction.

The Board's protestations that to permit judicial review of unauthorized agency action would put the agency at the mercy of objectors ignores the narrow area of unauthorized action in which review of a Board representation determination is available in a district court.

D. The Board concedes that in the court below it did not contest the correctness of the district court's finding that the Board failed to comply with the limitation upon its authority contained in Section 9(b)(1). Nevertheless, the Board now seeks to reactivate the merits by drawing a specious distinction between exceeding authority on the one hand, and exceeding authority exceedingly on the other. However, having conceded the merits in the court below, the Board is precluded from now raising any issue as to the validity of its construction of Section 9(b)(1).

Even assuming that the Board's construction of Section 9(b)(1) as requiring a separate election for professional employees only in circumstances where the professional employees are outnumbered by non-professional employees may properly be raised at this stage of the proceeding, the clear and unambiguous statutory language stands in the way of revision by administrative fiat. While the committee reports at times speak of the danger of a minority of professional employees being forced into bargaining units against their will "the language used in the statute goes beyond this limited purpose." *National Labor Relations Board* v. *Lion Oil Company*, 352 U. S. 282, 292.

Consistent with the underlying intent of Congress to enable the qualitatively distinct professional employees to maintain professional standards in collective bargaining, Section 9(b)(1) enacts an unlimited grant of freedom of choice of bargaining unit to professional employees whenever the Board proposes to commingle in the same bargaining unit employees of lesser attainments. In refusing to recognize this right, the Board acted without statutory warrant. In these circumstances the district court possessed jurisdiction to compel agency performance of a ministerial duty of a non-discretionary nature.

ARGUMENT.

The equity powers of the District Court may be invoked to review Board action in excess of statutory authority.

The respondent challenges the Board's representation determination in so far as the Board failed to comply with the limitation upon its unit finding authority as commanded by Section 9(b)(1) of the Act. The Board concedes that its disregard for the bounds of statutory authority constituted error (Board brief, pp. 8, 33-34). But, the Board asserts, it may fail to comply with a statutory requirement and escape interdiction by the equity powers of the district court since, save for constitutional issues, it has *carte blanche* to commit abuse of power in a representation determination (Board brief, p. 27). The Board draws much sustenance for its argument from *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297.

Switchmen's teaches that "the type of problem involved and the history of the statute in question become highly relevant" (320 U. S. at 301) in probing for the outer limits of the district court's jurisdiction. We turn preliminarily, therefore, to a delineation of the precise "type of problem involved" in the Board's erroneous action. If, as respondent maintains, the "type of problem" is definable within the framework of unauthorized exercise of power, then perforce the history of the statute takes on relevancy only in so far as it reveals that Congress intended that representation determinations be accorded a blanket immunity from extrastatutory review regardless of the nature of the agency action in question.

Section 9(b)(1) is the first of several limitations placed upon the Board's authority by the amended Act to establish an appropriate bargaining unit under Section 9(b). The limitation in express terms takes away from the Board and confers upon the professional employees themselves the right to determine whether the appropriate bargaining unit shall be confined to professionals or include non-professionals as well. The Board's sole discretion in this regard, preserved by Section 9(b), is to consider on a tentative or voting group basis whether a unit which combines professional and non-professional employees *may* be appropriate. At this point the Board's discretionary authority under Section 9(b) ceases and the limitation of the 9(b)(1) *proviso* takes hold.

Thus, in the absence of an affirmative vote by the professional employees alone in favor of a combined unit, the Board is flatly prohibited by the 9(b)(1) *proviso* from determining that a mixed unit of professional and non-professional employees *is* appropriate. The limitation is mandatory; it brooks of no exceptions. It affords neither opportunity for discretion nor room for construction.

Nevertheless, in the instant proceeding, having found five disputed job categories to be occupied by non-professional employees, the Board proceeded to combine three of these five categories (or a total of nine employees) in the same bargaining unit with the professional employees. The Board took this action despite the prohibition of the statute against inclusion of non-professionals with professionals "unless a majority of such professional employees vote for inclusion in such unit." The Board refused to conduct the statutory separate vote of professional employees substituting therefor its administrative judgment that the addition of the nine non-professional employees would not "destroy the predominantly professional character of

such unit."[3] This rule of "predominantly professional", engrafted upon Section 9(b)(1) as an exercise of administrative discretion, has served to deny to professional employees the statutory right to bargain collectively in units of their own choosing whenever the professionals outnumber the non-professionals.[4]

But the language of Section 9(b)(1) makes no distinction between the ratio of professional to non-professional employees nor does it speak in terms of a "close community of employment interest" which non-professional employees may otherwise have with professional employees.

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[3] The Board's decisions give no indication as to the ratio of professionals to non-professionals which suffices in its judgment to bring about the separate election for professionals where the bargaining unit is "predominantly professional". In *Federal Telecommunications Laboratories, Inc.*, 92 N. L. R. B. 1395, for example, the Board declined to conduct a 9 (b) (1) election even though the percentage of non-professional employees ran as high as 31 percent of the total number of employees in the bargaining unit as compared with approximately 4 percent in the instant representation proceeding.

Chairman Paul M. Herzog recognized the Board's administrative practice of giving only partial effect to Section 9 (b) (1) as less than "100 percent good law. I think it was more than 50 percent good law, and extremely good administrative practice. It seemed to us that the intent of Congress was to give professionals a chance to get out of nonprofessional units, and not to give a few nonprofessionals a chance to tangle things up for professionals. I think that was the basic reason for the decision." Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147-1148, June, 1948.

[4] In the following cases, the Board permitted the inclusion of non-professional employees in the percentages indicated without affording the professionals a separate vote to determine their desires as to inclusion with non-professionals: *Westinghouse Electric Corp., Lamp Div.*, 80 N. L. R. B. 591—22.2%; *E. R. Squibb and Sons*, 83 N. L. R. B. 792—11.1%; *Boeing Airplane Co.*, 86 N. L. R. B. 368—26.0%; *Westinghouse Electric Corp. South Philadelphia Works*, 89 N. L. R. B. 8—7.2%; *Schwarz Laboratories, Inc.*, 89 N. L. R. B. 930—29.1%; *Federal Telecommunications Laboratories, Inc., supra; Potomac Electric Co.*, 99 N. L. R. B.—17.5%; *Miller Electric Co.*, 101 N. L. R. B. 1014—7.5%; *Standard Oil Co.*, 107 N. L. R. B. 1524—7.0%.

Instead, Section 9(b)(1) mandates a separate election for professional employees in all circumstances in which the Board proposes to include such employees in the same bargaining unit with non-professionals. The "obvious effect of the proviso [Section 9(b)(1)] is merely a limitation on the Board's power to create a mixed unit." *Westinghouse Electric Corporation* v. *National Labor Relations Board*, 236 F. 2d 939, 943 (C. A. 3).

Clearly, therefore, the Court is not confronted here with Board error in the area of delegated expertise and discretion or in the area of conferred power of statutory construction.[5] Rather does the "type of problem involved" emerge as agency exercise of power whereof power there is none. The case presents the situation "where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action." *Panama Canal Co.* v. *Grace Line*, Nos. 251 and 252, October Term, 1957, decided April 28, 1958, at 9. It is the existence of a mandamus "type of problem" which, in the instant proceeding, permits of direct judicial review.

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[5] The court below was fully cognizant of the critical distinction between delegated discretion and unauthorized power. Judge Bazelon stated:

> "Equitable relief is clearly barred in the wide area of determinations which depend on the Board's expertise and discretion; as for example, in *Switchmen's Union*, that railroad yardmen should be included in a unit with certain other smaller groups of railroad employees, or, in *DePratter*, that full time production employees should be included in a unit with employees who devote only part time to production and the rest to other tasks. This case, however, presents 'a different "type of problem"'."[6]

[6] *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 89 U. S. App. D. C. 24, 27, 189 F. 2d 685, 688 (1951); see also *Farmer* v. *United Electrical, Radio & Machine Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36 (1953), cert. denied, 347 U. S. 943 (1954); *Leedom* v. *International Union*, 352 U. S. 145 (1956).

A. Inasmuch as the "type of problem" involves agency action outside statutory authority in deprivation of a statutorily created right direct judicial review is available

When first confronted in *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, with the question of the availability of judicial review through an original suit in equity, the Court there decided that the language of the statute and the relevant legislative history precluded review of a certification in a court of appeals as an "order" under Section 10(f) of the Wagner Act. The Court, however, left open for decision the distinct question of whether—

> "• • • the provisions of the Wagner Act, particularly Section 9 (d), have foreclosed review of its challenged action by independent suit in the district court • • • It can be appropriately answered only by a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy • • •" (308 U. S. at 412).

Clearly, therefore, the Court did not in *American Federation of Labor* v. *National Labor Relations Board* view the legislative history of the statute as foreclosing all possibility of extrastatutory judicial review save for constitutional issues.

In *Inland Empire District Council* v. *Millis*, 325 U. S. 697, the question of the availability of review of a Board representation determination arose this time by way of an original suit in equity in the district court. The ground for relief urged was that Section 9(c) of the Act as then written there required the Board to hold a pre-election rather than a post-election hearing. The Court examined the requirements of the statute and determined that the

Board acted within its delegated authority in conducting a post-election hearing. Again the Court did not accord conclusive effect to the legislative history of the Wagner Act as closing the door to equity jurisdiction save for constitutional issues. Instead, the Court in *Inland Empire*, reiterated the rule of unlawful action by way of departure from statutory requirements as a possible mode of direct judicial review of a representation determination.[6]

The Court's reluctance to foreclose equity jurisdiction on the premise that the language of the statute and the legislative history preserves only constitutional issues for direct judicial intervention assumes particular significance when it is noted that *Inland Empire* was decided sometime after the *Switchmen's* case. If *Switchmen's* possesses the compelling and definitive qualities attributed to it by the Board, it would have been a simple matter for the Court to have cited that case in the later *Inland Empire* case.[7] We suggest that in analyzing the statute in *Inland Empire* for the purpose of determining whether the Board possessed authority to hold a post-election rather than a pre-election hearing, the Court there applied in substance the unlawful departure from statute test of equity jurisdiction.[8]

The question whether given the necessary positive showing of Board action in plain departure from statutory

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[6] "That question should not be decided in the absence of some showing that the Board has acted unlawfully. Upon the facts presented, we think no such showing has been made, whether by way of departure from statutory requirements or from those of due process of law" (325 U. S. at 700).

[7] This is particularly so in view of the fact that the court below decided the jurisdictional question solely on the authority of the *Switchmen's* case. *Millis* v. *Inland Empire*, 144 F. 2d 539 (C. A. D. C.).

[8] "The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to

authority, judicial relief from this illegality would be forthcoming, was answered in the affirmative in *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145. In that case, the Court affirmed the holding of the court below[9] that the district court possessed original jurisdiction to enjoin the Board from acting without authority in depriving a labor organization of its compliance status under Section 9(h) of the Act.

In the *Mine Mill* case, as in the instant suit, Board action impaired a representation certification and the labor organization challenged the legality of the action by independent suit. There, as here, original jurisdiction was predicated on the ground that the "type of problem" created by the unlawful action came within the rubric of statutory power rather than administrative discretion. In the related non-compliance cases, *Farmer* v. *United Electrical, Radio &*

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determine whether the respondent did exceed his powers." *Harmon* v. *Brucker*, 355 U. S. 579.

"The question whether the statutory scheme of review is exclusive was first presented to the Court in *Inland Empire Dist. Council* v. *Millis*.* In that case a defeated union filed a bill in equity charging that the certification procedure followed by the Board violated the requirements of both the statute and due process. The Court ruled that it would be inappropriate to decide the question of reviewability 'in the absence of some showing that the Board has acted unlawfully,' and that 'upon the facts presented . . . no such showing has been made. . . .'** But clearly some form of review was afforded since the Court determined that the bill was not justified on the merits, thereby legitimatizing the N. L. R. B. procedure followed in that case.***" *NLRB's Discretionary Jurisdiction*, 71 Harv. L. Rev. 529-530.

* 325 U. S. 697 (1945); cf. *Switchmen's Union* v. *National Mediation Bd.*, 320 U. S. 297 (1943).

** 325 U. S. at 700.

*** See Dodd, *The Supreme Court and Organized Labor, 1941-1945*, 58 Harv. L. Rev. 1018, 1041-42 (1945).

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[9] *International Union of Mine, Mill and Smelter Workers* v. *Farmer*, 226 F. 2d 780 (C. A. D. C.)

Machine Workers, 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943 and *Farmer* v. *International Fur & Leather Workers Union*, 221 F. 2d 862 (C. A. D. C.) where the same "type of problem" existed, the court below enunciated and applied the principle that Board action in excess of statutory authority with resulting injury justifies direct judicial relief. In *Mine Mill*, the Court adopted the principle of *United Electrical* and *Fur & Leather Workers* and concluded that in undertaking to police non-Communist affidavits the Board proceeded without warrant in law. Clearly, therefore, the instant proceeding comes within the holding of the related non-compliance cases.[10]

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[10] The Board would distinguish the *Mine Mill* case, on the ground that the jurisdictional argument was not urged before this Court though advanced in the district court (Board brief, pp. 32-33, n. 22). It is apparent, however, that inherent in this Court's determination in *Mine Mill* that the Board acted without authority was the preliminary and necessary determination that jurisdiction existed in the district court to pass upon the merits. Certainly the question of jurisdiction remained before this Court quite independently of whether the Board withdrew that issue for it is axiomatic that a party may neither confer nor deny jurisdiction over the subject matter of a proceeding. The Board's further contention that neither *Mine Mill* nor *United Electrical* involved the considerations of delay in the ultimate determination of bargaining representatives which led Congress to preclude direct review of a Board representation determination, is equally without merit (Board brief, pp. 32-33, n. 22). In the analogous *United Electrical* case the Board argued in the court below that its actions in attempting to police non-Communist affidavits could not be directly reviewed because of Congress' desire to prevent delay in the administrative process culminating in certification of bargaining representatives. Thus, the Board stated (see Board brief No. 11727, *Herzog et al. v. United Electrical et al.*, in the court below, April 1953, pp. 19-20):

> "Similarly, it has repeatedly been held that the courts are without power to review any phase of a representation proceeding except as, under Section 9 (d) of the Act, that proceeding becomes the basis for a final order in an unfair labor practice proceeding." [Citations omitted.]
>
> "Judicial review of representation and unfair labor practice proceedings being precluded, therefore, except where such proceedings have ripened into a 'final order,' *a fortiori*, Board action preliminary to such proceedings [i.e., involving the non-Communist affidavit filing requirement of Section 9 (h)]

The principle applicable herein that agency action in excess of statutory authority with resultant judicially cognizant injury permits of direct review is set forth in *Harmon* v. *Brucker*, 355 U. S. 579. There the Secretary of the Army issued discharge certificates in form other than "honorable" and petitioners brought proceedings in the district court seeking nullification of those actions. The question before the Court was whether the actions of the Secretary of the Army, allegedly in excess of his statutory powers, afforded the district court original jurisdiction. The underlying statute provided for an Army Review Board with power to review the type of discharge issued and prescribed that "the findings thereof [shall] be final subject only to review by the Secretary of the Army". Hence, the Government argued, "such administrative procedure is exclusive and the courts are without jurisdiction to review those findings" (*ibid.*).

Holding that the district court possessed jurisdiction over the proceedings, the Court said in *Harmon* (*ibid.*):

> "Generally, judicial relief is available to one who has been injured by an act of a government official

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is not subject to judicial review. The sole exception to the exclusive method of review prescribed by the Act arises where an aggrieved labor organization, which does not otherwise have available to it any form of judicial review, challenges Board action on the basis of a substantial constitutional claim.

* The conclusion above stated is confirmed and fortified by the legislative history of the Act which demonstrates that Congress rejected proposals to permit direct review of representation cases on the ground that the delays involved would frustrate the basic policy of the Act to promote collective bargaining." [Citations omitted.]

But the court below regarded the argument of delay as providing no justification for refusing judicial relief in circumstances of agency action outside statutory bounds. It cannot be said, therefore, that the instant proceeding does not involve the same factors as were present in *Mine Mill* and the analogous *United Electrical* case and there thought not to militate against direct review of a Board representation determination.

which is in excess of his express or implied powers. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621-622; *Stark* v. *Wickard*, 321 U. S. 288, 310. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available."

The Court then proceeded to consider on the merits whether the Secretary of the Army exceeded his power under the applicable statutes by taking into account pre-induction activities of petitioners in determining the type of discharges to be issued to them upon separation from the Army. Upon analysis of the statutes the Court found no warrant for the power assumed by the Secretary of War.

The *Harmon* case is precisely in point. There, as here, the administrative action in question presents an identical "type of problem". In that case the unlawful less than honorable discharge certificate was based upon findings in an area beyond the ambit of the statute. In the instant proceeding the unlawful certificate of bargaining representatives was based upon findings in an area removed by statute from administrative determination. Here, no less than in *Harmon*, the challenge to agency action rests not upon interference with official discretion but rather "upon the charge of abusive power and its merits must be determined accordingly • • •". *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621-622.

That *Harmon* governs the case at bar is made abundantly clear in the related and distinguishing *Panama Canal Co.* v. *Grace Line*, Nos. 251 and 252, October Term,

1957, decided April 28, 1958. There suit was brought in the district court by steamship companies to compel the *Panama Canal Co.*, an agent of the President, to readjust the tolls of the Panama Canal. The underlying statute authorized the *Panama Canal Co.* to prescribe tolls and to change them. In deciding that the district court lacked jurisdiction to compel the *Panama Canal Co.* to fix new tolls, the Court drew the line between questions requiring the exercise of an informed agency discretion and questions requiring agency performance of a ministerial act. The question of costs to be included in the toll making procedure for the Panama Canal "involve nice issues of judgment and choice * * * left to the expertise of the agency burdened with the responsibility for decision" (id., at 8-9). In contradistinction the matter in *Harmon* permits of judicial relief since it "is peradventure clear * * * the agency is clearly derelict in failing to act * * * the inaction or action turns on a mistake of law * * *" (id., at 9).

So, too, in the instant proceeding, the unequivocal purpose of Section 9(b)(1) is to remove from agency authority any discretion to mix in the same bargaining unit professionals and non-professionals without performance of the ministerial act of ascertaining the desires of the professionals. Unlike the agency responsibility existent in *Panama Canal*, it cannot be said that in the instant case "the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms" or that "the very construction of the statute is a distinct and profound exercise of discretion" (id., at 9). Rather does the instant case fit the type of situation "where ministerial duties of a non-discretionary nature are involved" (id., at 9). Consequently, we submit, judicial relief is appropriate.

Nevertheless, the Board places great reliance upon *Switchmen's, supra,* as standing for the proposition that an administrative body may transcend statutory limits without subjecting itself to direct judicial review save only in so far as substantial constitutional issues may be involved. We shall demonstrate, however, that to cry *Switchmen's* is not to cry shibboleth.

B. *Switchmen's* precludes direct review only of action committed to agency discretion

Construed in the light of the precise issue there posed, *Switchmen's* precludes direct review only of a claim of erroneous findings in an area where the administrative agency has statutory authority to act. In that case, the question was as to the authority of the Mediation Board to settle a dispute under Section 2, Ninth and Fourth of the Railway Labor Act by a determination that a system-wide bargaining unit rather than a lesser or divisional bargaining unit was appropriate. The Mediation Board had certified the Brotherhood of Railway Trainmen as representative for all yardmen after a system-wide election in the New York Central Railroad. The Switchmen's Union contended that in certain divisions of the system separate votes should have been taken of the yardmen and for this reason sought cancellation of the certificate issued to the rival labor organization.

The Court referred to the "type of problem involved" as "highly controversial • • • jurisdictional disputes • • •" *Switchmen's, supra,* at 302-303. The legislative history of the statute, the Court pointed out, revealed that Congress did not intend to implicate the judiciary in the handling of this "explosive problem" (*id.*, at 303). Instead, Congress gave to the Mediation Board the authority "in election disputes to interpret the meaning of 'craft' as used in the statute" with finality (*id.*, at 305).

Quite clearly, therefore, interpretation of the meaning of the terms "craft" or "class" constituted the "type of problem" involved in *Switchmen's* which the Court held to be immune from direct judicial review. An analogous "type of problem" would be that involved in the usual determination of an appropriate bargaining unit which the Board is broadly empowered to make under Section 9(b) of the Act with comparable immunity.[11] *Mueller Brass Co.* v. *N. L. R. B.*, 180 F. 2d 402, 404-405 (C. A. D. C.); *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 491; *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 293 (C. A. 9), certiorari denied, 348 U. S. 687.

The analogy ceases, however, in the face of the type of administrative determination called for by the statutory *proviso* here in issue. The Board is flatly prohibited by Section 9(b)(1) from certifying a mixed unit of professional and non-professional employees, "unless a majority of such professional employees vote for inclusion in such unit." Departure from the plain limitation of the *proviso* cannot be justified either as an exercise of delegated administrative discretion or of vested power of statutory construction. The Board's mandatory duty in the proceeding at bar was simply to conduct the requisite election and to certify the kind of bargaining unit dictated by the results. The *proviso* permits of no other course.

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[11] The question in *Switchmen's* as well as in most Board representation determinations falls in the category of "a jurisdictional controversy between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins." *General Committee of Adjustment* v. *Southern Pacific Company*, 320 U. S. 338, 343; *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. R. Co.*, 320 U. S. 323.

Switchmen's, on the other hand, concerned statutory provisions which granted to rather than withheld authority from the agency to determine an appropriate unit. There the agency acted with statutory sanction whether the construction of Section 2, Ninth and Fourth of the Railway Labor Act by the Mediation Board be regarded as entailing an exercise in administrative discretion or an exercise in the application of a statutorily conferred power. Obviously, if the Railway Labor Act had expressly declared that certifications could be made only in separate divisions of a railroad system the "type of problem" the Court had before it in the *Switchmen's* case would have been entirely different, for it is the traditional function of a reviewing court to see to it that administrative authority is exercised within express statutory limitations.

The Court of Appeals for the Fourth Circuit, in denying direct review in *Madden* v. *Brotherhood and Union of Tr. Employees*, 147 F. 2d 439, on the authority of the *Switchmen's* case, adverted to the distinction between non-reviewable agency action founded in statutory authority and reviewable agency action lacking in statutory foundation. Judge Parker said:

> "The case is not one where the action of the Board is without constitutional or statutory authority, as in *Colorado* v. *Toll*, 268 U. S. 228, upon which the Brotherhood relies. See our decision in *Ferris* v. *Wilbur*, 4 Cir., 27 F. 2d 262 and cases there cited for the distinction" (*id.*, at 442).

Similarly, the Court below in *Air Line Dispatchers Association* v. *National Mediation Board*, 189 F. 2d 685, certiorari denied, 342 U. S. 849, rejected the contention of the Mediation Board that *Switchmen's* foreclosed original review of extrastatutory administrative action, stating (*id.*, at 688):

> "In each of these cases [*Switchmen's* and a series of related cases], the Board had chosen between alternate methods of settling a dispute over representation under Section 2, Ninth, of the Act. *The question was not as to the power of the Board to resolve the dispute but whether it had done so in an erroneous manner.*" (Emphasis added.)

We submit, *Switchmen's*, correctly viewed, presents no bar to original jurisdiction in the instant proceeding.[12]

C. The legislative history of the Act fails to reveal that Congress intended unauthorized administrative power to exist uncurbed by direct judicial review

The Board argues that its action herein, though without statutory authority, was intended by Congress to remain outside direct judicial review because of delay in the collective bargaining process inherent in such review. In the circumstances of this case, the Board's argument would compel the conclusion that having written into the amended Act a limitation upon the Board's powers to determine an appropriate unit, the Congress nevertheless intended in its desire to avoid "dilatory tactics" that the Board could with impunity disregard this limitation (Board brief, pp. 24-25).

We think the Board claims too much for in the absence of a specifically manifested intent on the part of the Congress to exclude judicial review in circumstances where, as here, the action in question is in derogation of statutory

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[12] We are cautioned by the Court in *Switchmen's* that "generalizations as to when judicial review of administrative actions may or may not be obtained are, of course, hazardous." 320 U. S. at 301. For a critical evaluation of the Court's opinion in *Switchmen's* see Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 428-430; Hart and Wechsler, *The Federal Courts and the Federal System* (The Foundation Press, 1953), p. 327. See, also, 33 N. Y. Univ. L. Rev. 219; 33 Notre Dame Lawyer 301.

authority, the courts retain the responsibility of determining the limits of statutory grants of authority. As the Court stated in *Stark* v. *Wickard*, 321 U. S. 288, 310:

> "The responsibility of determining the limits of statutory grants of authority • • • is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. • • • [U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

The Board's recital of Section 9(d) and 10(e) and (f)[13] as well as the legislative history of both the original and amended Acts nowhere manifests that the concern of Congress to avoid "dilatory tactics" in frustration of the Act's basic policy of promoting collective bargaining reached the point of exonerating agency abuse of power. Having written into the Act a *proviso* compelling the Board to defer to the wishes of professional employees in the matter of including non-professional employees in the same bargaining unit, it is inconceivable that Congress would regard resort to direct judicial relief against the failure of the Board to observe the *proviso* as "dilatory tactics."

Section 10(f) of the 1947 House Amendments to the Act provided for direct review by the courts of appeal of Board certifications in the same manner as from a final order of the Board (H. Rep. No. 245, 80th Cong., 1st sess., 43, 59-60, 1 Legislative History of the Labor Management Relations Act, 1947 (G. P. O., 1948), pp. 199-200, 334, 350-351). Had

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[13] "Mere failure to provide for judicial intervention [in the statute] is not conclusive; neither is the presence of language which appears to bar it." *Heikkila* v. *Barber*, 345 U. S. 229, 233.

this amendment been accepted, it would have meant that the courts of appeal of the various circuits would have been under a duty to decide not only whether a certification departed from statutory requirements, but also whether the underlying findings on which the certification was based, are supported by substantial evidence. Conceivably such broad statutory review in representation cases could have led to "dilatory tactics", and it was to the specific problem of direct review of discretionary determinations under Section 9(b) that Senator Taft was addressing himself in the statement quoted in the Board's brief (pp. 21-22). There is absent any manifestation that the opponents of direct review of Board certifications desired to go so far as to seal off the long standing equity powers of the district court in the particular circumstances here presented of agency action in excess of statutory authority. "To do so would but grant to the Board the Congressional power of repeal." *Office Employees International Union* v. *National Labor Relations Board*, 353 U. S. 313, 320.

In *Harmon, supra*, the underlying statute expressed an intent on the part of Congress to bar court review of the administrative determination there involved. Justice Clarke in his dissenting opinion, viewed "this legislative expression of finality * * * in context with the uninterrupted history of Congressional review, culminated by Congress' transfer of the review function to administrative bodies * * *" as negating the implied conclusion of the majority that Congress intended to permit judicial review.

But, as we read *Harmon* and the later *Panama Canal* case, the majority declared that agency determinations which go beyond the powers granted by Congress are a nullity, *i.e.*, without binding effect and hence not valid determinations at all. Therefore, in affording judicial review against agency unlawful assumption of power, the

underlying intent of Congress to attach finality[14] to "distinct and profound exercise of discretion" (*Panama Canal Co., supra,* at 9) fairly within agency authority remains undisturbed. The Court expressed itself in this regard in *Stark* v. *Wickard, supra,* at 309-310:

> "When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers."

In the absence of evidence that Congress explicitly limited the Board's discretion in Section 9(b)(1) with the intention that the Board itself determine with finality when it would choose to observe that limitation upon its powers, the courts have the duty to compel agency adherence to the statute as written. In a matter so fundamental as the orderly distribution of authority between legislature, courts and administrative agency, it cannot be left to mere inference that Congress meant to relegate enforcement of respondent's statutory right to the vagaries of the Board's sense of abnegation.

The Board further contends that direct review of representation determinations in substantial departure from the statute would invite a sea of cases before the district courts with horrendous effect upon the administration of the Act (Board brief, pp. 25-26). The Board protests too much. In *Stark* v. *Wickard, supra,* the Court was

[14] In *Harmon,* the court in effect interpreted "final" to mean final, if not contrary to granted authority. *Estep* v. *United States,* 327 U. S. 114.

similarly confronted with a contention that judicial review of unauthorized agency action "puts the agency at the mercy of objectors." In rejecting this contention, the Court indicated that judicial review did not extend to "• • • matters of administrative discretion as to which there is no justiciable right or are clearly authorized by a valid Act" (*id.*, at 310-311).

As previously noted (*supra*, p. 12), the court below carefully delineated the narrow area in which direct review of a Board representation determination is available in a district court.[15] Only departure from the proscribed area of determining as appropriate a mixed bargaining unit of professional and non-professional employees without the necessary separate election may become the object of direct judicial restraint. The area of delegated exercise of discretion under Section 9(b) essential to the administrative process, as distinguished from the mandatory limitation of the 9(b)(1) *proviso*, remains judicially reviewable only in the mode provided in the Act.

It is hardly a valid objection to direct judicial review that the district courts may hereafter with increased fre-

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[15] The denial of the right of respondent under the several interdependent provisions of Section 9 of the Act to represent professional employees in a separate bargaining unit presents a legal wrong independently justiciable under Section 10 of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1009). Section 10 is expressly made inapplicable to "(1) statutes [which] preclude judicial review or (2) agency action [which] is by law committed to agency discretion." With regard to the first ground for preclusion there must exist a legislative intent "clearly, convincing and unmistakable" to forbid such review (Legislative History of the Administrative Procedure Act, Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 368). That intent, we maintain, in the circumstances of this case, is neither explicit in the Act nor indicated in its history. Since the agency action in question falls outside of agency discretion, the provisions of Section 10 of the Administrative Procedure Act for court review take hold. Cf. *Air Line Dispatchers Association* v. *National Mediation Board*, *supra*, at 689; 67 Harv. L. Rev. 1084.

quency be asked to review a Board representation determination on a complaint which alleges excess of statutory authority simply because such jurisdictional ground is available (Board brief, pp. 25-26). If respondent is correct in its view of the applicable law, it cannot be denied judicial relief merely because others may hereafter utilize the same ground in attempting to invoke direct review.[16] Moreover, to assign respondent to political means for realization of its statutory right (Board brief, p. 23, n. 13), makes a mockery of the constitutional scheme of confining an administrative agency through judicial intervention to the area chartered for it by the legislature.

In sum, between the congressional objective to avoid delay in representation proceedings and the congressional objective to curb the Board's exercise of discretionary authority in a particular area of representation determination explicitly delineated in Section 9(b)(1), we believe the latter consideration must be regarded as paramount. Otherwise the professional employees would suffer a sacrifice or an obliteration of a right Congress has created in their behalf were the Board, by an unauthorized action, to leave them completely without the unqualified right of self-determination of their own bargaining unit provided by the true reach of the Act.

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[16] See, for example, *National Maritime Union* v. *McLeod*, U. S. D. C. (S. D. N. Y.), Civil No. 128-100, decided March 27, 1958; *International Brotherhood of Electrical Workers* v. *Leedom*, U. S. D. C. (DC), Civil No. 3166-57, decided January 2, 1958 (since the decision of the court below) and denying direct review.

D. Having conceded in the court below that it erred in failing to apply Section 9(b)(1) the Board may not now by indirection contest the merits. Moreover, the meaning of the *proviso* is plain that Congress intended unqualifiedly to limit the Board's unit finding authority with respect to professional employees.

The Board concedes that in the court of appeals it did not contest the district court's rejection of the Board's interpretation of Section 9(b)(1) "but chose to stand on its jurisdictional objections." The Board nevertheless proceeds to argue that its "interpretation of Section 9(b)(1) has a rational basis * * *" It does so for the stated reason that the Court may conclude that arbitrary disregard of statutory authority provides "special reasons for implying the availability of a review procedure not otherwise open" (Board brief, pp. 33-34).

The distinction drawn by the Board between rational and irrational abuse of power is not an appealing one. In either case statutory authority for the action taken is nonexistent. Even the most compelling reasons will not justify plain departure from the statute for the Board has only to conform to the discipline of the judicial function no less binding upon administrative agencies than upon the courts. Succinctly expressed by Justice Cardozo in *Anderson* v. *Wilson*, 289 U. S. 20, 27:

"We take this statute as we find it."

Having conceded the merits in the court below, the Board is precluded from now raising any issue as to the validity of its construction of Section 9(b)(1). *Sonzinsky* v. *United States*, 300 U. S. 504, 514. Nevertheless, the Board indulges in a back-door effort to reactivate the merits in the guise of a specious dichotomy between exceeding authority on the one hand, and exceeding authority exceedingly on the other. Without in any way acceding

to the Board's attempt to reintroduce the issue on the merits, it is clear that the Board's failure to be governed by the limitation of Section 9(b)(1) while at the same time certifying a "predominantly professional" bargaining unit, violated the *proviso*.

Dismissing the language of the proviso as "literally" requiring a separate election for professional employees whenever it is proposed to include them in the same bargaining unit with non-professional employees, the Board discounts the primary canon of statutory interpretation that when the statutory language is clear and unambiguous on its face, the statute must be applied as written. Instead, the Board places exclusive reliance upon the legislative history of Section 9(b)(1) in a manner which brings to mind "the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute". *Greenwood* v. *United States*, 350 U. S. 366, 374.

Whatever comfort the Board may derive from the committee reports on Section 9(b)(1) as evidencing a legislative interest to assure self-determination of bargaining units to professional employees in circumstances where they are outnumbered by non-professional employees "the language used in the statute goes beyond this limited purpose." *National Labor Relations Board* v. *Lion Oil Company*, 352 U. S. 282, 292. Indeed the unambiguous language of the *proviso* provides ample indication that Congress intended to assure to professional employees the right of self-determination of their bargaining unit in every possible circumstance where the Board would intrude a non-professional group. This is so because in enacting Section 9(b)(1) and the companion Section 2(12) defining a professional employee, Congress sought to remedy in its entirety the basic mischief of forced commingling of professional and non-professional employees.

The unreserved terms Congress employed in granting professional employees the right to choose their own bargaining unit resulted from careful consideration of the special problems that distinguish professionals from others. The spokesman for the professional engineering societies protested against compulsory commingling of professionals and non-professionals in the same bargaining unit, stating:

> "The background, education, training and work interest of professional employees and non-professional employees are inherently divergent. It is futile to expect that a forced grouping of the professional and nonprofessional employees in any plant or organization could possibly form an appropriate bargaining unit. Under present law and its administration, such plainly inappropriate groupings are made and, by fiat, are declared appropriate. We do not consider this to have been the intent of Congress * * *" (Hearings before the Senate Committee on Labor and Public Welfare on S. 55, 80th Cong., 1st sess., p. 1705).

The Senate Report reflected these protests by noting that:

> "Although there has been a trend in recent years for manufacturing corporations to employ many professional persons, including architects, engineers, scientists, lawyers and nurses, no corresponding recognition was given by Congress to their special problems. *Nevertheless, such employees have a great community of interest in maintaining certain professional standards* * * *" (1 Legislative History of the Labor Management Relations Act, 1947, p. 417; emphasis supplied).

While the House and Senate Reports refer to the danger of a minority of professional employees being forced into bargaining units against their will (Board brief, pp. 34-36), it is of paramount significance that Congress did not so

circumscribe the right of self-determination of bargaining units accorded professional employees in the statutory language it adopted. Instead Congress enacted a broad grant of freedom of choice to professionals consistent with the fundamental legislative objective of maintaining professional standards through collective bargaining in units undiluted by individuals of lesser attainments.

The method selected by Congress to secure the objective of maintaining professional standards was to require the Board uniformly to defer to the judgment of the very professionals whose unique interests would be at stake. They, alone, not the Board were to determine by separate vote whether their professional standards would be placed in jeopardy by the inclusion of disparate groups in the same bargaining unit. Thus, the Senate Report (1 Leg. Hist., p. 431) states:

> "Section 9(b): The several amendments to this subsection propose to limit the Board's discretion in determining the kind of unit appropriate for collective bargaining:
>
> (1) The Board is prohibited from including professional employees in units with other employees unless they first vote in favor of such inclusion * * *"

Again, the Senate Report (1 Leg. Hist. p. 425) refers to the relationship between the definition of "professional employees" in Section 2(12) and the requirement of "separate voting units of professional employees" in Section 9(b)(1):

> "(12) 'Professional employees': The significance of this amendment appears in Section 9 which is amended by the committee bill to require separate voting units of professional employees. Here again the Committee was careful in framing a definition to cover only strictly professional employees such

as, engineers, chemists, scientists, architects and nurses."

In similar vein, the House Conference Report states (1 Leg. Hist. p. 551; H. Conf. Rept. No. 510, 80th Cong. 1st sess. p. 47):

> "The conference agreement, in Section 9(c)(2), covers in specific terms [the matter of crafts and] professional employees * * *. In the case of the latter the Board cannot include both professional employees and employees who are not professional employees in the same unit, unless a majority of the professional employees vote for inclusion therein."

It is said by the Board that a separate election for professional employees in the circumstances of this case "would serve only to enable professional employees to deprive other employees with a close community of employment interests—e.g., the 9 non-professionals in the unit here . . . of the most suitable means of exercising their collective bargaining rights" (Board brief, p. 36). The short answer is, of course, that in enacting Section 9(b)(1) Congress endeavored to protect the distinctive collective bargaining interests of professional employees in the maintenance of professional standards. Clearly Congress considered that the interests of non-professionals were adequately protected under the Act and required no corrective legislative measures. For the Board to now insist that professional employees are to be denied the right to undiluted bargaining units on the specious ground that non-professionals might otherwise remain outside a bargaining unit limited to professional employees, is to revert to the very evil of mixed bargaining units Congress sought to expunge. The fallacy of the Board's approach lies in a persistent refusal to recognize that the standard employed

by the Act with regard to units of professional employees is qualitative rather than quantitative.[17]

Furthermore the fears expressed by the Board as to the plight of the small group of non-professionals are entirely unwarranted. Thus, in the case at bar, had the professional employees been permitted a separate election and had they voted in favor of a separate unit, the non-professional employees would then constitute a unit by themselves. In the latter event the non-professional employees would comprise a category known in Board parlance as "technical employees". As such they would possess distinctive bargaining interests commonly associated with "technical employees" in no way impaired by the fact that these non-professionals or "technical employees" would be few in number.[18]

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[17] The Board points to the fact that the vote of the nine non-professionals did not affect the results of the election and concludes therefrom that the views of the overwhelming majority of professional employees were fully reflected despite the absence of a separate election (Board brief, p. 36). Aside from the basic consideration adverted to above that Congress did not posit the right of professional employees to self-determination of their own bargaining unit upon a game of numbers, the failure of the Board to conduct a 9(b)(1) election in circumstances of a "predominantly professional" bargaining unit enables a minority of non-professional employees to combine with a minority of professional employees to frustrate the choice of a bargaining representative which a voting group confined to purely professional employees might otherwise produce. Moreover, the thrust of the *proviso* is in the area of choice of bargaining unit as distinguished from choice of bargaining representative. By denying to the professional employees herein the separate choice of bargaining unit, the Board directly nullified the statute regardless of the outcome of the election as to choice of bargaining representative.

[18] "Technical employees" are regarded by the Board as constituting an appropriate unit because of their own distinctive interests. In the Board's *Seventeenth Annual Report* (1952) Board policy with regard to "technical employees" is set forth in part as follows:

> "Technical employees usually are placed in separate units unless one of the interested parties objects to the establishment of such a unit. The reason for grouping technical employees separately is that ordinarily their duties and interests differ substantially from those of other employees in the same plant." (pp. 80-81; case citations omitted)

To adopt the Board's view as to legislative intent would truly allow the tail to wag the dog by depriving professional employees of the "fullest freedom in exercising the rights guaranteed" by the Act. It would produce the ridiculous result that 51 professional employees could be combined with 49 non-professional employees without being afforded the choice of a separate bargaining unit, while 49 professional employees could not be combined with 51 non-professional employees unless the professional employees themselves so wished. We do not believe Congress gave statutory sanction to the right of professional employees to be represented in bargaining units of their own choosing only to have such right frittered away in an administrative game of numbers.[19]

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[19] The Board asserts that Congress inferentially approved of the "predominantly professional" construction of Section 9(b)(1) by remaining silent when apprized of such construction in the 1948 Hearings before the Joint Committee on Labor-Management Relations and in the Board's 1948-1949 Annual Reports. It would be novel indeed to transmute into legislative history without more the statements of an administrative agency made to a subsequent Congressional committee or to Congress itself. If such were the case the annual report or the appearance of an agency official before a committee of Congress would provide the medium for a continuous legislative convention. But the fact that the Joint Committee did not recommend overruling the Board's "predominantly professional" construction of Section 9(b)(1) can not be construed as legislative approval, for Congress never acted upon even the recommendations made by the Committee. In fact, since 1947, Congress has never undertaken any comprehensive revision of the National Labor Relations Act. Thus the question is an open one. Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365-6.

Conclusion

For the foregoing reasons, it is respectfully submitted that the order of the District Court be affirmed.

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